

**The Kroger Company and Allan Partain**

**United Food and Commercial Workers, Local 455, AFL-CIO and Allan Partain.** Cases 16-CA-19703 and 16-CB-5519

July 31, 2001

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

Upon charges filed by Allan Partain on January 11, 1999, against the Kroger Company and United Food and Commercial Workers, Local 455, AFL-CIO, the General Counsel of the National Labor Relations Board issued a consolidated complaint on March 18, 1999. The complaint alleges that the Respondent Kroger (Kroger) violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act and that the Respondent Union (Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act. Kroger and the Union each filed a timely answer admitting in part and denying in part the allegations of the complaint.

On June 10, 1999, the General Counsel, Kroger, the Union, and the Charging Party filed a petition to transfer case to the Board and stipulation of the record. The parties waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision and recommended Order. The parties agreed that the charges, the consolidated complaint, the answers, and the stipulation with attachments shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties.

On August 13, 1999, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel, Kroger, and the Union filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

**FINDINGS OF FACT****I. JURISDICTION**

The Kroger Company, a Texas corporation with a principal office in Houston, Texas, is engaged in the retail grocery business. During the calendar year relevant here it purchased and received at its Texas operations goods and materials valued in excess of \$50,000, which were shipped directly from points located outside the State of Texas and received gross revenues in excess of \$500,000.

We find that the Kroger Company is an employer engaged in commerce within the meaning of Section 2(2),

(6), and (7) of the Act, and that United Food and Commercial Workers, Local 455, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES***A. Facts*

The stipulated record reflects that at all material times the Union has been the exclusive collective-bargaining representative of the employees in the following unit:

All employees employed by Houston Division of the Texas Marketing Area of Kroger Food Stores in stores operating in the counties of Austin, Brazoria, Brazos, Chamber, Fort Bend, Galveston, Grimes, Harris, Jefferson, Liberty, Madison, Matagorda, Montgomery, Orange, Polk, San Jacinto, Walker, Waller, Washington, Wharton, and Store #990 operated by the Dallas Marketing Area of the Kroger Co., excluding all persons employed in the meat departments, store managers, co-managers, management trainees, professional employees, product demonstrators, guards and supervisors as defined in the L.M.R.A., as amended.

The parties' collective-bargaining agreement contained a dues-checkoff provision<sup>1</sup> which required Kroger to deduct and remit dues and service fees monthly to the Union pursuant to a lawfully executed authorization signed by the employee.<sup>2</sup>

On June 14, 1996, Allan Partain, an employee at Respondent Kroger's Broadway, Pearland, Texas store, executed a checkoff authorization form, stating in relevant part, that:

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and initiation fees as shall be certified by the Secretary-Treasurer

<sup>1</sup> Art. 3 of the parties' collective-bargaining agreement, effective April 2, 1995, through April 1, 2000, provides:

Section 3.01 During the life of this agreement, the Employer shall deduct initiation fees and regular dues weekly from employees who individually and voluntarily certify in writing on the check-off authorization form for such deductions. Such authorization shall be binding on the employees for the duration of this agreement unless the authorization is revoked in accordance with the provisions of the Taft-Hartley Act of 1947, as amended. No deductions shall be discontinued until the employer has verified through the Union that the employee's request for revocation is timely and proper. The Union shall certify in writing a list of its new members, together with signed authorization cards with an itemized list of such initiation fees and dues to be deducted from such members. The Employer shall promptly remit all such sums deducted in this manner to the Union monthly. Timing for such deductions may be worked out locally between the Employer and the Union.

<sup>2</sup> The collective-bargaining agreement does not contain a union-security clause.

of Local 455 of the United Food and Commercial Workers International Union, AFL-CIO, and remit same to said Secretary-Treasurer.

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 455, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my signature thereto.

The Secretary-Treasurer of Local 455 is authorized to deposit this authorization with any Employer under contract with Local 455 and is further authorized to transfer this authorization to any other Employer under contract with Local 455 in the event that I should change employment.

On or about November 1, 1997, Partain terminated his employment with Kroger, telling Store Manager Dan Grasby that he needed to leave his job to serve a 6-month jail sentence. Grasby told Partain that he would be rehired on his release from jail. On April 8, 1998, Partain began work as a new hire at Kroger's Broadway, Pearland, Texas store. He did not execute a new checkoff authorization form.

Since the Union and Kroger utilized a compatible computer system, the Union sent Kroger on a weekly basis a computer diskette containing a list of names of its employees who the Union certified were to have dues deducted from their paychecks by Kroger. This practice had been ongoing for a number of years and was used when Partain returned to work on April 8, 1998. It is undisputed that Kroger neither saw nor verified the checkoff authorization cards, but relied solely on the Union's representation contained on the computer diskette. Subsequent to April 8, 1998, the Union sent a computer diskette containing Partain's name to Kroger, which deducted dues from Partain's paycheck and remitted them to the Union.

On December 10, 1998, Partain resigned from the Union and requested that the Union cease causing dues to be deducted from his paycheck. By letter dated January 25, 1999, the Union informed Partain that his withdrawal from membership was accepted but his previously executed checkoff authorization card remained in effect and

his request to revoke it was untimely and that the dues deduction would continue.

### B. *The Parties' Contentions*

The General Counsel contends that the Union unlawfully caused Kroger to deduct union dues after Partain severed his employment relationship with Kroger and returned to its employ as a new hire without executing a new dues-checkoff authorization. Relying on *Industrial Towel & Uniform Service*, 195 NLRB 121 (1972), enf. denied 473 F.2d 1258 (6th Cir. 1973); and *Railway Clerks (Yellow Cab)*, 205 NLRB 890 (1973), enf. 498 F.2d 1105 (5th Cir. 1974), the General Counsel argues that continuity of employment is a necessary condition for a dues deduction authorization and that if, as here, the employment relationship is severed, the dues-deduction authorization lapses with it. The General Counsel further contends that the language of the checkoff authorization card does not clearly and unmistakably authorize the dues deduction because Partain returned to the employ of the same employer and did not become employed by "any other employer."

The Union argues that there is no violation of the Act since on its face the dues-checkoff authorization signed by Partain indicates that it survives a change in employment, including a break in service. The Union further argues that the cases relied on by the General Counsel are distinguishable because the dues-checkoff authorization in the instant case is significantly broader than those at issue in *Industrial Towel* and *Yellow Cab*. The Union further argues that the dues-checkoff authorization voluntarily signed by Partain is clear, unambiguous, and demonstrates his willingness to provide financial assistance to the Union wherever he works, until timely revoked.

Kroger states that it is neutral in this matter and takes no position on how the law should be interpreted.

### III. DISCUSSION

The issue presented is whether the dues-checkoff authorization signed by Partain lawfully permitted the Union to cause Kroger to deduct union dues after Partain severed his employment relationship with Kroger and subsequently returned to its employ as a new hire without executing a new dues authorization.<sup>3</sup>

<sup>3</sup> In its answer to the complaint, the Union asserts as an affirmative defense that the complaint is time barred by Sec. 10(b) since the Charging Party filed his charge on January 11, 1999, more than 6 months after his April 8, 1998, return to employment at Kroger. We find, however, that each occurrence of the unlawful dues deduction at the Union's request constitutes a separate violation of the Act. As the General Counsel argued on brief, and consistent with applicable law, we find that the remedy is limited by Sec. 10(b) to the 6-month period prior to the filing of the charge. See *Teamsters Local 667 (American Freight)*,

The Board has long recognized that, apart from the requirement for periodic revocability set forth in Section 302(c)(4), disputes involving dues-checkoff provisions essentially involve contract interpretation rather than interpretation and application of the Act. *Furr's, Inc.*, 264 NLRB 554, 556 (1982). Thus, in *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), the Board held that there is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a checkoff. 302 NLRB 322 at 328. The Board requires, however, that the employee's agreement to such an arrangement be manifested in "clear and unmistakable language." *Id.*

It would be contrary to these principles to find, without regard to its specific terms, that a dues-checkoff authorization may never remain effective when an employee is rehired following severance of the employment relationship. In our view, the Board's holdings that the specific dues-checkoff authorizations at issue in *Yellow Cab* and *Industrial Towel*, did not survive severance of employment were necessarily based on the specific language of the authorizations signed by the employees. Those decisions, then, do not establish a per se rule that a checkoff authorization can never survive the severance of employment. See *Commercial Workers Local 540 (Pilgrim's Pride)*, 334 NLRB 114 (2001). The issue remains, however, whether the dues-checkoff authorization signed by Partain is a clear and unmistakable waiver of his Section 7 rights. We find that it is not.

The language of the dues checkoff executed by Partain authorizes its transfer "to any other Employer under contract with Local 455" in the event Partain changed employment. Here, however, Partain severed his employment with Kroger and was subsequently rehired by the same Employer. True, Partain's employment relationship changed. But Partain did not gain employment with some "other" (a different) employer with a contract with the Union. The issue is fairly debatable, and in our decision in *Pilgrim's Pride*, supra, which involves the same authorization language, we acknowledge that the Union's position with respect to the dues checkoff is arguably meritorious. Nevertheless, we find here that the language does *not* constitute a clear and unmistakable waiver by Partain to have his dues deduction revived when he was reemployed by Kroger. Such a waiver would have required language that specifically addressed the situation implicated here: reemployment by the same

employer. (For example, the language might have recited, "This authorization will remain effective if my employment with the Employer is terminated and I am later re-employed by the Employer.")

In the absence of a waiver, the Union violated Section 8(b)(1)(A) and (2) of the Act by causing Kroger to withhold dues from Partain's wages after he returned to work as a new employee, and Kroger violated Section 8(a)(1), (2), and (3) of the Act by withholding and remitting dues to the Union. *Railway Clerks (Yellow Cab)*, 205 NLRB 890 (1973), *enfd.* 498 F.2d 1105 (5th Cir. 1974).

Our conclusion here is contrary to the arbitrator's award in *Pilgrim's Pride*, but as we explain, deferral to the award is not required.<sup>4</sup> In *Pilgrim's Pride*, the Board considered whether the union violated Section 8(b)(1)(A) of the Act by filing a grievance and lawsuit to compel arbitration of a grievance claiming that the employer had violated the contract by ceasing dues checkoff for certain rehired employees who had executed checkoff authorizations during a prior period of employment. The language of the checkoff authorizations at issue in *Pilgrim's Pride* is identical to the checkoff authorization in the instant case and the arbitrator's award found on facts identical to those present here that the employer had violated the collective-bargaining agreement "by refusing to withhold Union dues from those employees who had signed Checkoff Authorizations, and which authorizations had not yet expired under their terms, and were still in existence at the time of rehire." The union sought and obtained court enforcement of the award. See *Commercial Workers Local 540 v. Pilgrim's Pride Corp.*, 193 F.3d 328 (5th Cir. 1999).

However an arbitrator's decision has preclusive effect only to the extent set forth in the Board's deferral to arbitration policy. And the Board does not defer where a party to the unfair labor practice proceedings was not a party to the arbitration proceedings. See *Masters, Mates & Pilots (Seatrail Lines)*, 220 NLRB 164, 168 (1975); *Retail Clerks, Local 1100 (White Front San Francisco)*, 203 NLRB 548, 549 *fn.* 2 (1973). Although this case involves an arbitrator's interpretation of identical checkoff authorization language, it does not involve the same parties to the arbitration proceeding.

<sup>4</sup> The Union did not raise deferral as a defense in either its answer to the complaint or in its brief. Deferral is an affirmative defense that is waived if not timely raised. In its brief to the Board, however, the General Counsel specifically noted that the precise issue presented in the instant case, namely whether a dues-checkoff authorization survives severance of the employment relationship was also presented in *Pilgrim's Pride*, a case already pending before the Board.

302 NLRB 694 (1991); *Farmingdale Iron Works*, 249 NLRB 98 (1980), *enfd.* as modified 661 F.2d 910 (2d Cir. 1981).

## ORDER

The National Labor Relations Board orders that

A. The Respondent, the Kroger Company, Pearland, Texas, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Assisting the Union, United Food and Commercial Workers, Local 455, AFL-CIO, by checking off membership dues not sanctioned by employees through currently executed checkoff authorizations.

(b) Continuing to deduct union membership dues pursuant to checkoff authorizations, which are no longer valid or discriminating against employees in any other manner to encourage membership in the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Union reimburse Allan Partain for all sums improperly deducted from his wages in payment of union dues, beginning July 11, 1998, with interest.

(b) Within 14 days after service by the Region, post at its facility in Pearland, Texas, copies of the attached notice marked "Appendix A."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by its authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. The Respondent, United Food and Commercial Workers, Local 455, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Kroger Company to deduct union dues from the wages of employees pursuant to checkoff authorizations which are no longer valid because of a break in an employee's employment.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Kroger reimburse Allan Partain for all sums improperly deducted from his wages in payment of union dues, beginning July 11, 1998, with interest.

(b) Within 14 days after service by the Region, post at their offices copies of the attached notice marked "Appendix B."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Mail a copy of the notice to the Charging Party.

(d) Forward to the Regional Director for Region 16 signed copies of the notice sufficient in number for the Respondent Kroger, if willing, to post at its facility, where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

## APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

<sup>6</sup> See fn. 5, *supra*.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT assist the Union by checking off membership dues not sanctioned by employees through currently executed checkoff authorizations.

WE WILL NOT continue to deduct union membership dues pursuant to checkoff authorizations which are no longer valid and WE WILL NOT discriminate against employees in any other manner to encourage membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with the Union reimburse Allan Partain for all sums improperly deducted from his wages in payment of his union dues, with interest.

THE KROGER COMPANY

## APPENDIX B

### NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT cause or attempt to cause the Kroger Company to deduct union dues from the wages of employees pursuant to checkoff authorizations which are no longer valid.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with the Respondent Kroger reimburse Allan Partain for all sums improperly deducted from his wages in payment of union dues with interest.

UNITED FOOD AND  
COMMERCIAL WORKERS, LOCAL  
455, AFL-CIO